

14
No. 85-781

Supreme Court, U.S.
FILED

JAN 8 1986

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED
STATES, AND RONALD GEISLER, EXECUTIVE CLERK
OF THE WHITE HOUSE, PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

JOINT BRIEF OF RESPONDENTS MICHAEL D. BARNES, ET AL.,
AND THE UNITED STATES SENATE IN OPPOSITION
TO THE PETITION FOR CERTIORARI

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Respondents, Representative Michael D. Barnes and the other members of the House of Representatives who were the original plaintiffs in this action, and the United States Senate, an intervenor in the district court, submit this joint opposition to the petition for certiorari. The court of appeals has decided neither the standing question nor the pocket veto question "in a way in conflict with applicable decisions of this Court," Sup. Ct. R. 17.1(c), or with those of another court of appeals, *id.*, 17.1(a). On the merits, the court of appeals held that the President's failure to return a bill to Congress with his objections, when Congress had not constitutionally prevented the bill's return, rendered the bill a law. This

ruling faithfully followed this Court's decisions in *Wright v. United States*, 302 U.S. 583 (1938), and *The Pocket Veto Case*, 279 U.S. 655 (1929). The court of appeals also strictly adhered to this Court's decisions, including *Coleman v. Miller*, 307 U.S. 433 (1939), in holding that respondents have standing to redress the failure of the Executive Clerk and the Administrator of General Services to perform their statutorily required ministerial duties of delivering, preserving, and publishing the bill as a law. Petitioners' actions nullify respondents' votes to enact the legislation and thereby eviscerate respondents' constitutional lawmaking roles.

Finally, petitioners' mootness question is merely another form of their challenge to respondents' standing and should not be resolved in the summary fashion proposed by petitioners. If the Court concludes that the mootness question may not be disposed of by denying certiorari, then respondents would support plenary review of the mootness issue along with any other questions that the Court determines to review.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE STANDING DECISION OF THE COURT OF APPEALS IS FULLY CONSISTENT WITH THE DECISIONS OF THIS COURT

1. Respondents alleged in their complaints that the Executive Clerk of the White House and the Administrator of General Services were violating statutory provisions directing the former to deliver, and the latter to receive, to preserve, and to publish all bills that have become law under the Constitution.¹ Under respondents' view of the

¹ Complaint for Declaratory and Mandamus and/or Injunctive Relief, ¶¶ 12-13, 28-32 (Jan. 4, 1984); Complaint of Intervenor for Declaratory Relief, ¶¶ 4-5, 13-14, 17-20 (Jan. 27, 1984). Since the action was initiated, a reorganization statute has transferred these duties of the Administrator of General Services to the Archivist of the United States. Pub. L. No. 98-497, § 107(d), 98 Stat. 2291 (1984) (amending 1

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pocket veto clause, when the President had not returned H.R. 4042, 98th Congress (1983), to the Congress within ten days after its presentment to him, the bill had become "a Law, in like manner as if he had signed it." By failing to perform the ministerial steps required to complete the process by which federal legislation is enacted, petitioners are unlawfully nullifying the respondents' votes to enact H.R. 4042 into law and eviscerating their constitutional roles in the legislative process.

2. Until their supplemental petition for rehearing, the petitioners had conceded in the court of appeals that the Senate had standing to litigate its claim in this case. App. 15a, 17a & n.16, 49a n.1.² The Senate intervened in this action pursuant to a statute that authorizes the Senate Legal Counsel, when directed by a resolution of the Senate, to intervene "in the name of the Senate . . . in any legal action . . . in which the powers and responsibilities of Congress under the Constitution are placed in

U.S.C. §§ 106a, 112, 113 (Supp. II 1984)). Accordingly, petitioner Burke has been substituted as a party to this action.

Federal statute requires the Archivist to receive all laws from the President and "carefully [to] preserve the originals." 1 U.S.C. § 106a (Supp. II 1984). The Archivist is also required to cause to be compiled and published the United States Statutes at Large, "which shall contain all the laws . . . enacted. . . ." *Id.* § 112. Statute also provides for "publications in slip or pamphlet form of the laws of the United States issued under the authority of the Archivist. . . ." *Id.* § 113. The Archivist is required to "furnish to the Public Printer a copy of every Act . . . as soon as possible . . . after it has become a law under the Constitution without [the President's] approval." 44 U.S.C.A. § 710 (West Supp. 1985). The Public Printer is responsible for printing copies of public laws in slip form. 44 U.S.C. § 709 (1982); 44 U.S.C.A. § 711 (West Supp. 1985). These statutes are set forth in an appendix bound with this brief, denominated Appendix H to be consecutive with the appendices to the petition for a writ of certiorari.

² Both the majority and Judge Bork appeared to view the constitutional issues of the Senate's standing and that of individual legislators as identical. *Ibid.* The petitioners understood correctly prior to their supplemental rehearing petition in the court of appeals that the standing of the Senate as a body to litigate this action suffices to establish standing.

issue." 2 U.S.C. § 288e(a) (1982). Recognizing the need for "standing . . . under section 2 of article III of the Constitution," *id.*, the intervention statute carries to the limits of Article III the Senate's standing to defend "the powers and responsibilities of Congress under the Constitution," *id.* This Court has established that "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who would otherwise be barred by prudential standing rules.' *Warth v. Seldin*, 422 U.S., [490] at 501 [(1975)]." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979); *accord Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring). The intervention statute constitutes, with the resolution of the Senate in this case, App. 3a n.3, "official action" manifesting that "the political branches [have] reach[ed] a constitutional impasse." *Goldwater v. Carter*, 444 U.S. 996, 998, 997 (1979) (Powell, J., concurring).

3. Petitioners posit that this action is no more than a suit to enforce H.R. 4042, and then argue that "Congress and its members are not injured in any fashion distinct from that of citizens generally by the President's failure to enforce a law." Pet. at 20. But respondents did not sue to enforce the substantive requirements of H.R. 4042. Rather, this suit seeks adherence of Executive officials to ministerial statutes that implement the constitutional design for the legislative process by requiring the preservation and publication as law of bills that have completed the constitutional procedure for enactment.³ Although in

³ Thus, respondents did not bring this action against the officials in the Departments of State or Treasury who acted inconsistently with the requirements of H.R. 4042, because respondents were not seeking an order that H.R. 4042 be enforced. Nor did they sue the President, contrary to the assertions of petitioners, Pet. 10, 17, 20, 22, and Judge Bork, App. 47a, 48a, 49a, 57a, 111a. Rather, respondents sued only the officials who had acted inconsistently with 1 U.S.C. §§ 106a, 112, and 113 (Supp. II 1984). They alleged neither that the President acted unconstitutionally in failing either to sign or to return H.R. 4042 with

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some situations individuals may have standing to claim that pocket vetoed bills are law, the legislative branch, which has a "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast v. Cohen*, 392 U.S. 83, 102 (1968), always suffers a "distinct and palpable injury," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), when the responsible officials fail to preserve and to publish its enactments.

In putting into effect the Constitution which many of its members had participated in drafting, the First Congress enacted into law its understanding that the preservation of laws is the natural completion of the process of enacting them. The petitioner Acting Archivist is the heir, in 1 U.S.C. § 106a (Supp. II 1984), to the original responsibility of the Secretary of State to receive forthwith from the President and to "carefully preserve the originals" of all bills that had become law, including those bills that became law for not having been returned to the Congress with objections. Act of September 15, 1789, ch. 14, § 2, 1 Stat. 68. Subsequently, speaking of a law that had received the President's approval, this Court held that "when a bill, thus attested [by the presiding officer of each House], receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable." *Field v. Clark*, 143 U.S. 649, 672 (1892) (emphasis added).

In addition to preservation, the First Congress established the related principle that completion of the law-making process requires the recording and publication of the laws. It charged the Secretary of State with the duty, on the receipt of bills which had become law, to "cause

his objections, nor that the President unlawfully failed to obey H.R. 4042. Instead, respondents alleged that, as a consequence of the President's entirely lawful decision not to act upon the bill, H.R. 4042 is a law under Art. I, § 7, cl. 2, of the Constitution. Respondents seek relief solely against the officials whose duty it is to cause H.R. 4042 to be preserved and published after it became law through the President's inaction.

the same to be recorded in books to be provided for the purpose," to publish them in public newspapers, and to "cause one printed copy to be delivered to each Senator and Representative of the United States, and two printed copies duly authenticated to be sent to the Executive authority of each State." Act of September 15, 1789, ch. 14, § 2, 1 Stat. 68.

Recording and publication are now merged in the requirement that the Archivist cause the publication in slip form of "every Act and joint resolution, as soon as possible after its approval by the President, or after it has become a law under the Constitution without his approval." 44 U.S.C.A. § 710 (West Supp. 1985); 44 U.S.C. § 709 (1982). The Archivist must also cause the publication in the Statutes at Large of "all the laws . . . enacted during each regular session of Congress." 1 U.S.C. § 112 (Supp. II 1984).⁴ Just as the First Congress charged the Secretary of State with the duty of delivering to each Senator and Representative a copy of each printed law, current law continues to reflect Congress' direct interest in the receipt of printed evidence of its laws by providing that "[t]he Joint Committee on Printing shall control the number and distribution of the copies" of both the slip laws and the Statutes at Large. 44 U.S.C. § 709 (1982); *id.* § 728. Thus, members of Congress, as explicit beneficiaries of the requirement that enacted laws be published, are "within the zone of interests to be protected," *Asso-*

⁴ The publication of a statute provides the official notice of its enactment to the public. Once a statute has been published, any party may take notice of it and is free to initiate legal action, if necessary, to secure its benefits. Under federal law the "Statutes at Large shall be legal evidence of laws, . . . in all the courts of the United States, . . ." 1 U.S.C. § 112 (Supp. II 1984); *see id.* § 113 (same for slip laws). In a practical as well as a logical sense, the publication requirement is soundly viewed as the final step of the process by which legislation is enacted. In neither sense can the publication be "viewed as merely a formal acknowledgment." Pet. 14.

ciation of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970), by the publication requirement.⁵

4. Respondents' underlying injury is the nullification of their constitutional lawmaking authority. Contrary to Judge Bork's assertion of the "complete novelty," App. 47a, of this controversy, which, he maintains, "for most of

⁵ Petitioners maintain "that it is plain that respondents lack standing to seek enforcement of these provisions," Pet. 14, relying on a statement of this Court in *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980). In *Kissinger* the Court declined to infer a private right of action to enforce the Federal Records Act of 1950, 44 U.S.C. § 2901 *et seq.* (1982), and the Records Disposal Act, 44 U.S.C. § 3314 (1982), because "[t]he legislative history of the Acts reveals that their purpose was not to benefit private parties, but solely to benefit the agencies themselves and the Federal Government as a whole," 445 U.S. at 149.

This finding lends no support to petitioners' position for three reasons. First, the Court decided no standing issue in *Kissinger* but decided only the statutory question whether Congress had intended to grant a right of action to private individuals in enacting the particular records acts in that case. *Id.* at 149-50. The Court expressly reserved the question of the maintenance of an action alleging "that the administrators and the Attorney General have breached a duty to enforce the Records Act, since no such action was brought here." *Id.* at 150 n.5.

Second, the purpose of the statutes at issue in *Kissinger* is so dissimilar and unrelated to the purpose of the statutes underlying respondents' claim that the Court's observation has no relevance to this case. *Kissinger* concerned records management statutes that governed procedures for the retention and disposal of executive agency records. As the Court made clear, the purpose of these routine housekeeping statutes is to serve the administrative needs of executive agencies. *Id.* at 149. In contrast, the statutes at issue here serve the constitutional legislative function by prescribing the ministerial steps that result in a law's being treated as a law.

Finally, if the two sets of statutes were comparable, *Kissinger* would support, not undercut, congressional standing here. The Court established in *Kissinger* that *private* parties could not sue to enforce records management statutes, because they are intended "solely to benefit the agencies themselves and the Federal Government as a whole." *Ibid.* However, in this case respondents sued not as private parties, but as the branch of "the Federal Government as a whole" that is constitutionally responsible for enacting laws.

our history . . . would have been inconceivable," App. 48a, redressing interference with the exercise of governmental power is a revered purpose for the invocation of judicial authority. The very case that established the principle of judicial review, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), was an action by a putative government official for the delivery of the commission necessary to furnish him with evidence of his constitutional authority to exercise governmental power.⁶ The parallel between this action and Marbury's suit is strong. Marbury asserted that under the Constitution he had been appointed a justice of the peace for the District of Columbia. He claimed that the Secretary of State had failed to perform a ministerial duty, delivery of his judicial commission, necessary to provide him with public evidence of the completion of his appointment and, consequently, of his authority to perform the duties of the office. Similarly, respondents here assert that, under the Constitution, they have enacted H.R. 4042 into law, and that the petitioners have failed to perform the ministerial duties necessary to furnish public evidence of their enactment.⁷

Since *Marbury* this Court has adjudicated actions by governmental litigants to establish their entitlement to

⁶ The Court recognized that Marbury was asserting his "right to the office itself. . . . He will obtain the office by obtaining the commission, . . ." *Id.* at 171-72. The Court contrasted Marbury's suit for a writ of mandamus to obtain the authority to sit as a judge with a suit for the value of the office, that is, a money judgment for his salary. *Ibid.* The Court approved Marbury's suing for his commission, instead of for his salary, because "[t]he value of a public office, not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing." *Ibid.*

⁷ Strikingly, the statute on which Marbury relied is the precise forerunner of the statutes underlying respondents' action. The basis for Marbury's action for a writ of mandamus against the Secretary of State was section 4 of the Act of September 15, 1789, which provided that the Secretary "shall keep the . . . seal [of the United States], and shall make out and record, and shall affix the said seal to all civil commissions, to officers of the United States, to be appointed. . . ." 1 Stat. 68.

exercise governmental power. For example, in *Coleman v. Miller*, 307 U.S. 433 (1939), members of the Kansas state senate who had voted against ratification of the proposed Child Labor Amendment to the U.S. Constitution alleged that their "votes against ratification have been overridden and virtually held for naught." *Id.* at 438. This Court held that "these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. . . . They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect. . . ." *Ibid.* There is no principled distinction between a suit by state legislators to vindicate their votes, which were sufficient to prevent their state's ratification of a constitutional amendment, and an action by federal legislators to vindicate their votes, which were sufficient to enact a federal law.

Judge Bork is concerned that the standing decision of the court of appeals will give the states or the President the right to challenge national laws that intrude directly on their constitutional authority. App. 57a, 60a. They already have that right. In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the State of South Carolina challenged the constitutionality of the Voting Rights Act of 1965. While holding that South Carolina lacked standing to raise several claims, including those grounded upon due process, the bill of attainder clause, and the separation of powers, *id.* at 323-24, the Court permitted South Carolina to challenge the Act's constitutionality "[a]s against the reserved powers of the States," *id.* at 324.⁸

⁸ *Coleman v. Miller* and *South Carolina v. Katzenbach* refute Judge Bork's contention that states never have standing to allege "an injury to governmental powers," but may sue only when "required by federal statute to expend money." App. 63a n.6. His view that *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled on other grounds, *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985), demonstrates that pecuniary injury is the only "concrete injury in fact that confer[s] standing" upon states cannot be squared with the tradition of litigation by states to challenge federal

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Similarly, in *Nixon v. Administrator of General Services*, 433 U.S. 425, 439, 448-49 (1977), this Court recognized the right of both incumbent and former presidents to claim that a statute intrudes unconstitutionally on a presidential privilege. The standing decision of the court of appeals is consistent with this Court's determination that injury to the authority of governmental entities may confer standing.

5. The decision of the court of appeals does not depart from the principle, emphasized by petitioners, Pet. 17, and by Judge Bork, App. 70a, that "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 104 S.Ct. 3315, 3325 (1984). Contrary to petitioners' assertion that the separation of powers precludes resolving the pocket veto question in this case, the court of appeals carefully followed this Court's decisions regarding the constitutional structure of government. As Judge McGowan wrote for the court, "[b]y defining the respective roles of the two branches in the enactment process, this court will help to preserve, not defeat, the separation of powers." App. 18a.

No claim could be more fundamental to our representative system than respondents' claim that they have enacted a law. This Court articulated long ago its "duty . . . , from the performance of which it may not shrink, to give full effect to the provisions of the Constitution relating to the enactment of laws. . . ." *Field v. Clark*, 143 U.S. at 670. More recently the Court rejected the asser-

"usurpation of governmental powers." App. 63a n.6. Indeed, in *Coleman* this Court explicitly rejected the assertion that only pecuniary injury supports governmental standing:

This class of cases in which we have exercised our appellate jurisdiction on the application of state officers may be said to recognize that they have an adequate interest in the controversy by reason of their duty to enforce the state statutes the validity of which has been drawn in question. In none of these cases could it be said that the state officers invoking our jurisdiction were sustaining any "private damage."

307 U.S. at 445.

tion that the controversy over the legislative veto should be left to the political processes. Addressing the same constitutional clause involved in this suit, Art. I, § 7, cl. 2, the Court stated, "Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process." *INS v. Chadha*, 462 U.S. 919, 945 (1983). "[T]he prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Id.* at 951. This Court has firmly held that disputes over the allocation of legislative authority under these provisions of the Constitution "cannot be evaded by courts because the issues have political implications. . . ." *Id.* at 943.

II.

THIS CASE IS NOT MOOT

1. This dispute remains a live, justiciable controversy, because the petitioners' denial of their statutory obligations to cause H.R. 4042 to be preserved and published as a law continues to injure respondents. Petitioners suggest that this action is moot, based upon their view that its vitality is dependent upon the current fiscal consequences arising from the enactment of H.R. 4042. This argument fails because it rests upon petitioners' misunderstanding of the suit as an attempt to enforce H.R. 4042. Because respondents seek to enforce, not H.R. 4042, but 1 U.S.C. § 106a and related provisions on publication, the existence of a justiciable controversy is not determined by the current effect of H.R. 4042.

Beginning with the Act of September 15, 1789, the Congress has required the publication of "every" law. When the Congress provided for a permanent official record of its enactments in the Statutes at Large, it directed the Attorney General to enter into a contract with Little and Brown for a work containing all laws "whether obsolete,

repealed, or in force, and whether temporary or permanent. . . .” Act of March 3, 1845, No. 10, § 2, 5 Stat. 798, 799. The Archivist must include in the Statutes at Large “all” the laws “enacted during each regular session of Congress.” 1 U.S.C. § 112 (Supp. II 1984). In performing their ministerial functions, the petitioners must cause to be published all bills that have become law without judging the effectiveness of any of them. Neither Congress’ interest in the preservation and publication of laws that it has enacted, nor petitioners’ correlative procedural duties under statute, are affected in any way by the substantive content of the laws.

The cases regarding subsequent changes in law, which petitioners cite to suggest that this controversy is moot, are therefore inapposite. It is undoubtedly true that a suit to challenge or to enforce a statute is moot once that statute has been repealed. *Kremens v. Bartley*, 431 U.S. 119, 128-29 (1977); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972) (per curiam). Here, however, the preservation and publication statutes that respondents sued to enforce have not been repealed since this action was filed, but remain in full force and effect.⁹ The principle that intervening changes in law may moot actions in the course of their adjudication has no bearing on this controversy.¹⁰

⁹ The only change in these statutes since the filing of this action is their amendment to transfer duties from the Administrator of General Services to the Archivist of the United States. Pub. L. No. 98-497, § 107(d), 98 Stat. 2291 (1984) (amending 1 U.S.C. §§ 106a, 112, 113 (Supp. II 1984)).

¹⁰ This Court held in *Coleman v. Miller* that a group of Kansas state legislators cumulatively had a cognizable “interest in maintaining the effectiveness of their votes,” 307 U.S. at 438, without ascertaining whether their votes would have any ultimate legal effect. In particular, the legislators’ standing did not depend upon their demonstrating that their vote on Kansas’ ratification of a constitutional amendment would affect the amendment’s ratification or failure, as a part of the Constitution. The Court did not rule, as petitioners’ characterization of our action as one for “a purely formal acknowledgment,” Pet. 15,

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2. To the extent that the effectiveness of H.R. 4042 is an issue, there are continuing legal consequences to the question whether H.R. 4042 was a duly enacted limitation on appropriations during Fiscal Year 1984. The auditing and account-settlement laws of the United States require that consideration be given, after the end of a fiscal year, to the lawfulness of expenditures under all laws that were in effect during that year. To assure that agency records are available for audits by the Comptroller General, the Comptroller General may require agencies to keep records for a period of not more than ten years. 31 U.S.C. § 3523(c)(1) (1982). The statute of limitations on the settling of accounts by the Comptroller General runs three years from an agency’s receipt of substantially complete accounts for the period covered by the account. *Id.*, § 3526(c)(1); 62 Comp. Gen. 498, 502 (1983). The status of

would imply, that, until the legislators could show that a substantive legal outcome depended upon their votes, their controversy was premature. Rather, it found that the Kansas legislators possessed an adequate interest in the vindication of their votes to obtain a simple determination whether Kansas was to be recorded as having ratified the amendment. Similarly, in order to vindicate their votes to enact it, respondents remain entitled to a declaratory judgment that H.R. 4042 is a law.

Petitioners’ citation (Pet. 12, 15 n.13) of *National Organization for Women, Inc. v. Idaho*, 459 U.S. 809 (1982), is not to the contrary. In *NOW v. Idaho*, the Court ordered dismissed as moot a challenge to practices regarding ratification of the Equal Rights Amendment. The Administrator of General Services, who had the statutory duty to record states’ ratification votes, contended successfully in that case that, because the extended date for ratification of the Amendment had expired, “the Amendment has failed of adoption no matter what the resolution of the legal issues presented here, and the Administrator informs us that he will not certify to the Congress that the Amendment has been adopted.” Memorandum for the Administrator of General Services Suggesting Mootness at 3, *NOW v. Idaho*. Here, in contrast, if respondents’ understanding of the pocket veto clause is sustained, petitioners will be obliged to cause H.R. 4042 to be published as a law. Unlike the situation in *NOW v. Idaho*, respondents do not seek a recordation of their futile votes in favor of a defeated measure. Rather, they seek vindication of their votes that succeeded in enacting a law.

H.R. 4042, which was passed as a limitation on Fiscal Year 1984 expenditures, continues to have a bearing on the auditing of expenditures and the settlement of accounts for that year.

We assume that the officials who were responsible for expenditures that may have been subject to H.R. 4042 acted in good faith and would not be subject to any personal responsibility for its violation. We also share the petitioners' assumption, Pet. 16, that the expended funds will not be recouped. Nevertheless, if an audit of expenditures for Fiscal Year 1984, in light of a determination that H.R. 4042 was a law, establishes that officials have breached the Anti-Deficiency Act by expending funds in violation of a statutory restriction, then the head of the agency involved "shall report immediately to the President and Congress all relevant facts and a statement of actions taken." 31 U.S.C. § 1351 (1982). If it were necessary to show a continuing legally cognizable interest of the Congress in the status of H.R. 4042 beyond the vindication of its role in the lawmaking process, this statutory obligation to report to the Congress would establish the requisite continuing injury to the Congress from petitioners' failure to preserve and to publish H.R. 4042 as a law.

III.

THE COURT'S RESOLUTION OF THE MERITS STRICTLY ADHERES TO THIS COURT'S POCKET VETO DECISIONS

Although the issue of the scope of the President's pocket veto authority presents an important federal question, the Court should not grant certiorari to review the decision below, because the court of appeals did not decide the issue "in a way in conflict with applicable decisions of this Court." Sup. Ct. R. 17.1(c). To the contrary, the court of appeals properly interpreted the pocket veto clause, guided by this Court's two decisions explicating the pocket veto provision, *The Pocket Veto Case*, 279 U.S. 655 (1929), and *Wright v. United States*, 302 U.S. 583

(1938).¹¹ Reading these cases together and interpreting the pocket veto clause in light of the purposes that the Framers intended it to serve in the lawmaking process, the court correctly concluded that the circumstances of Congress' adjournment between sessions of the Ninety-eighth Congress permitted the President constitutionally to return H.R. 4042 to Congress with his veto. Accordingly, the court held that the President could not pocket veto the bill and that, therefore, when he failed to take any action on the bill, it became a law.

1. The court of appeals properly based its analysis upon "[t]he manifest purpose of the pocket veto clause[, which] has guided application of the clause by the Supreme Court, . . ." App. 23a. The pocket veto provision is one element in the "single, finely wrought and exhaustively considered, procedure," *Chadha*, 462 U.S. at 951, devised by the Framers for the sharing of legislative power. The constitutional scheme that the Framers adopted provides the President with a "limited and qualified power to nullify proposed legislation by veto." *Id.* at 947. "The President's unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person." *Id.* at 951.

The pocket veto clause effectuates this balanced arrangement by prescribing the outcomes that obtain when the President neither signs nor vetoes a bill within ten days of its presentment to him. In that event, the bill becomes a law, "unless Congress by their Adjournment prevent its Return, in which Case it shall not be a Law." Art. I, § 7, cl. 2. This provision preserves the constitution-

¹¹The court also relied upon its prior holding in *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (per Tamm, J.), which addressed the President's attempt to pocket veto a bill during Congress' Christmas adjournment. In *Kennedy*, the court of appeals applied this Court's two decisions and held that, because by its adjournment Congress had not prevented the President from returning the bill with his objections, the pocket veto was ineffective and the bill had become law. The Executive did not seek this Court's review of that decision.

al allocation of legislative power by establishing a purely defensive pocket veto mechanism "to safeguard the President's opportunity" to veto bills. *Wright*, 302 U.S. at 596. As this Court has explained,

The constitutional provisions have two fundamental purposes; (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes.

Ibid. Following this Court's admonition "not [to] adopt a construction which would frustrate either of these purposes," *ibid.*, the court of appeals identified the "most important" lesson from *Wright*: "[I]ts rule of construction requires a court to find that the President was truly deprived of his opportunity to exercise his qualified veto power before it may hold that return was 'prevented'; a court that fails in this responsibility ends up sacrificing, without justification, Congress's right to reconsider disapproved legislation," app. 29a, 29a-30a. Thus, relying strictly upon this Court's teaching, the court of appeals based its holding that "H.R. 4042 became law" upon its finding that, "when Congress adjourned its first session *sine die* on the day it presented H.R. 4042 to the President, return of that bill to the originating house was not prevented." App. 46a.

2. The analysis that led the court to conclude that the circumstances of the adjournment had not prevented the bill's return strictly followed this Court's guidance in its two prior analyses of the question. The *Wright* case addressed President Roosevelt's attempt to return a vetoed bill to the Senate while the Senate was in a three-day recess, but the House of Representatives was sitting. The Secretary of the Senate had accepted the veto message and had presented it to the Senate when it reconvened. The Court held that the President's return of the bill by delivery to the Secretary of the Senate constituted an effective veto, because,

In returning the bill to the Senate by delivery to its Secretary during the recess there was no violation of any express requirement of the Constitution. The Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return.

Nor was there any practical difficulty in making the return of the bill during the recess. The organization of the Senate continued and was intact. The Secretary of the Senate was functioning and was able to receive, and did receive, the bill.

302 U.S. at 589-90. As the court of appeals described the *Wright* holding, "Given 'the manifest realities of the situation,' the Court held, return to an agent of the originating house was wholly effective." App. 28a (quoting *Wright*, 302 U.S. at 595). Thus, this Court held in *Wright* that, because the Secretary of the Senate was available to accept veto messages from the President during the Senate's adjournment, the Senate, by its adjournment, had not constitutionally prevented the President from returning the disapproved bill to the Senate. Similarly here, the court of appeals properly held that, because the House had authorized its Clerk to accept veto messages from the President during its adjournments, the President was not prevented, within the meaning of the pocket veto provision, from returning H.R. 4042 with his objections.

3. Petitioners attempt to sidestep the ineluctable import of the *Wright* case by focusing upon the Court's earlier pocket veto adjudication, *The Pocket Veto Case*. In that case the Court sustained President Coolidge's pocket veto of a Senate bill during the five-month adjournment between sessions of the Sixty-ninth Congress, rejecting the argument by beneficiaries of the bill that the pocket veto had been ineffective. The Court concluded that Congress had prevented the President from returning the bill because neither House had provided authorization for an agent to receive vetoed bills from the President during an adjournment. In dictum the Court added its view that "the delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the

constitutional mandate." 279 U.S. at 684. Petitioners contend here, as they unsuccessfully argued below, that "*The Pocket Veto Case* establishes that the President is [constitutionally] prevented from returning a bill with a veto message, . . . when Congress has adjourned between sessions." Pet. 25. Petitioners' reliance here upon *The Pocket Veto Case* rests solely upon the fact that in both cases intersession adjournments were involved.

The court of appeals squarely followed this Court's holdings in rejecting petitioners' proffered interpretation of *The Pocket Veto Case*. The Court's analysis in *The Pocket Veto Case* itself undermines petitioners' reliance upon it. The Court there held expressly that the designation of an adjournment is irrelevant to the constitutional question, because "the determinative question" is not what type of adjournment occurs, but solely "whether it is one that 'prevents' the President from returning the bill to the House in which it originated within the time allowed." 279 U.S. at 680. Thus, it was not the fact that Congress had been in an intersession adjournment that caused the Court in *Pocket Veto* to conclude that the President was prevented from returning the bill to Congress. Rather, it was the fact that the absence, at that time, of a practice of Congress' accepting presidential messages through its agents while it was out of session rendered such a return too vulnerable to uncertainty and delay. *Id.* at 684-85. The Court held only that, given the circumstances of adjournments at that time, the Constitution required "a public return to the House itself." *Id.* at 685.

The fact "[t]hat the Court was not categorically denying the use of agents for delivery of veto messages was made clear in . . . *Wright*. . . ." App. 27a. In the *Wright* case, as here, "[t]he chief, if not the sole, reliance for the argument that the bill could not be returned by the President during the Senate's recess is our decision in the *Pocket Veto Case*." 302 U.S. at 593. The Court in *Wright* rejected this mechanical invocation of the dictum in *The*

Pocket Veto Case and interpreted the decision more flexibly, concluding that "the reasoning of the decision is inapposite to the circumstances of this case," *ibid.*, because "the sort of dangers which the Court envisaged . . . appear to be illusory when there is a mere temporary recess," *id.* at 595. Examining "the manifest realities of the situation" of a brief recess of one House, *ibid.*, the Court in *Wright* found,

In such case there is no withholding of the bill from appropriate legislative record for weeks or perhaps months, no keeping of the bill in a state of suspended animation with no certain knowledge on the part of the public whether it was seasonably delivered, no causing of any undue delay in its reconsideration. When there is nothing but such a temporary recess the organization of the House and its appropriate officers continue to function without interruption, the bill is properly safeguarded for a very limited time and is promptly reported and may be reconsidered immediately after the short recess is over. The prospect that in such a case the public may not be promptly and properly informed of the return of the bill with the President's objections, or that the bill will not be properly safeguarded or duly recorded upon the Journal of the House, or that it will not be subject to reasonably prompt action by the House, is we think wholly chimerical.

Ibid.

As the court of appeals stated, "*Wright* indisputably establishes that mere absence of the originating house does not prevent return if (1) there is an authorized agent to accept delivery of a veto message, and (2) such a procedure would not entail the delay and uncertainty justly feared by the Court in the *Pocket Veto Case*." App. 30a (emphasis in original). Thus, "[t]he principle that . . . runs through *Pocket Veto* and *Wright* is a simple one: whenever Congress adjourns, return of a veto message to a duly authorized officer of the originating house will be effective *only* if, under the circumstances of that type of adjournment, such a procedure would not occasion undue

delay or uncertainty over the returned bill's status." App. 32a (emphasis in original).

Applying this principle, the court of appeals correctly found that the President's return veto of H.R. 4042 to the House of Representatives would have generated neither undue delay nor uncertainty. In the contemporary era, "with Congress almost constantly in session and matters of legislative concern constantly proliferating," *Gravel v. United States*, 408 U.S. 606, 616 (1972), intersession "adjournments do not differ in any practical respect from the intrasession adjournments at issue in *Wright*," app. 33a. First, "intersession adjournments of the modern era" are far shorter than "the five or six month intersession adjournments typical at the time of the *Pocket Veto Case*." App. 33a. Second, "Uncertainty no more characterizes return during adjournment tha[n] does delay. . . . [T]he organization of each house of Congress remains unchanged, and their respective staffs continue to function uninterrupted. More importantly, neither house any longer lacks an authorized procedure for acceptance of veto messages during adjournment." App. 35a-36a (footnote omitted). Thus, under this Court's decisions, the court of appeals properly found that "when Congress adjourned its first session *sine die* on the day it presented H.R. 4042 to the President, return of that bill to the originating house was not prevented. . . . [T]herefore, . . . H.R. 4042 became law, . . ." App. 46a.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY 1986.

APPENDIX H

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1 U.S.C. § 106a (Supp. II 1984). Promulgation of laws:

Whenever a bill, order, resolution, or vote of the Senate and House of Representatives, having been approved by the President, or not having been returned by him with his objections, becomes a law or takes effect, it shall forthwith be received by the Archivist of the United States from the President; and whenever a bill, order, resolution, or vote is returned by the President with his objections, and, on being reconsidered, is agreed to be passed, and is approved by two-thirds of both Houses of Congress, and thereby becomes a law or takes effect, it shall be received by the Archivist of the United States from the President of the Senate, or Speaker of the House of Representatives in whichsoever House it shall last have been so approved, and he shall carefully preserve the originals.

1 U.S.C. § 112 (Supp. II 1984). Statutes at Large; contents; admissibility in evidence:

The Archivist of the United States shall cause to be compiled, edited, indexed, and published, the United States Statutes at Large, which shall contain all the laws and concurrent resolutions enacted during each regular session of Congress; all proclamations by the President in the numbered series issued since the date of the adjournment of the regular session of Congress next preceding; and also any amendments to the Constitution of the United States proposed or ratified pursuant to article V thereof since that date, together with the certificate of the Archivist of the United States issued in compliance

with the provision contained in section 106b of this title. In the event of an extra session of Congress, the Archivist of the United States shall cause all the laws and concurrent resolutions enacted during said extra session to be consolidated with, and published as part of, the contents of the volume for the next regular session. The United States Statutes at Large shall be legal evidence of laws, concurrent resolutions, treaties, international agreements other than treaties, proclamations by the President, and proposed or ratified amendments to the Constitution of the United States therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

1 U.S.C. § 113 (Supp. II 1984). "Little and Brown's" edition of laws and treaties; slip laws; Treaties and Other International Acts Series; admissibility in evidence:

The edition of the laws and treaties of the United States, published by Little and Brown, and the publications in slip or pamphlet form of the laws of the United States issued under the authority of the Archivist of the United States, and the Treaties and Other International Acts Series issued under the authority of the Secretary of State shall be competent evidence of the several public and private Acts of Congress, and of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and international agreements other than treaties, as the case may be, therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof.

44 U.S.C. § 709 (1982). Public and private laws, postal conventions, and treaties:

The Public Printer shall print in slip form copies of public and private laws, postal conventions, and treaties, to be charged to the congressional allotment for printing

and binding. The Joint Committee on Printing shall control the number and distribution of copies.

44 U.S.C.A. § 710 (West Supp. 1985). Copies of Acts furnished to Public Printer:

The Archivist of the United States shall furnish to the Public Printer a copy of every Act and joint resolution, as soon as possible after its approval by the President, or after it has become a law under the Constitution without his approval.

44 U.S.C.A. § 711 (West Supp. 1985). Printing Acts, joint resolutions, and treaties:

The Public Printer, on receiving from the Archivist of the United States a copy of an Act or joint resolution, or from the Secretary of State, a copy of a treaty, shall print an accurate copy and transmit it in duplicate to the Archivist of the United States or to the Secretary of State, as the case may be, for revision. On the return of one of the revised duplicates, he shall make the marked corrections and print the number specified by section 709 of this title.

